in either state (*McNaughton* v. *McGirl*, 20 Mont. 124, 63 Am. St. Rep. 610; *Buttfield* v. *Stranahan*, 192 U. S. 470); communication by telegraph or telephone (cases *supra*, and *Muskogee Tel. Co.* v. *Hall*, 118 Fed. 382); the *transit* of persons (*Crandall* v. *Nevada*, 6 Wall. 35; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 218); the *transportation* of persons or property by boat, rail, or express (*The Passenger Cases*, 7 How. 283; *The Daniel Ball*, 10 Wall. 557; *Crutcher* v. *Kentucky*, 141 U. S. 47); the *piping* of oil or gas (*State* v. *Indiana &c. Co.*, 120 Ind. 575); *driving* of cattle (*Kelly* v. *Rhoads*, 188 U. S. 1), in completion of a commercial transaction across state lines, and the written documents whereby such transactions are effected (*Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 24 Sup. Ct. 563).

As to the *instrumentalities*, the commerce powers extend to interstate bridges (*Luxton* v. *North River Bridge*, 153 U. S. 525), and "from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies come into use. They were intended for all times and all circumstances,"—(Chief Justice WAITE in *Pensacola Tel. Co.* v. *Western U. Tel. Co.* supra). In due time the flying machines will undoubtedly be included.

Insurance (*Hooper* v. *California*, 155 U. S. 648; *New York Insurance Co.* v. *Cravens*, 178 U. S. 389), loaning money, (*Nelms* v. *Mortgage Co.*, 92 Ala. 157), dealing in lands in other states (*Honduras &c. Co.* v. *State Board*, 54 N. J. L. 278), or in foreign bills of exchange (*Bamberger* v. *Schoolfield*, 160 U. S. 149), or in futures, *Ware and Leland* v. *Mobile County*, 209 U. S. 405, 121 Am. St. Rep. 21, 24, 28 Sup. Ct. 526), or carrying on a building and loan association business (*Southern Building & L. Ass'n* v. *Norman*, 98 Ky. 294), or a brokerage or commission business (*United States* v. *Hopkins*, 171 U. S. 578), or the transfers of corporate shares, (*New York* v. *Reardon*, 204 U. S. 152, 27 Sup. Ct. 188), or the sale or transportation of the waters of one state into another state, (*Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 28 Sup. Ct. 529) is not *interstate* commerce, in such a sense as to prevent state regulation. Neither is mining (*Utley* v. *Mining Co.*, 4 Colo. 369), nor the production or manufacture of things intended for interstate commerce, (*United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Kidd* v. *Pearson*, 128 U. S. 1, 9 Sup. Ct. 6), nor gathering them together for the purpose of sending them to other states (*Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82), or after sending them there keeping them there for the purpose of use or sale (*Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 577) if not in the original package (*May* v. *New Orleans*, 178 U. S. 496). H. L. W.

WAIVER OF CONDITIONS IN INSURANCE POLICY BY KNOWLEDGE OF AGENT WHERE POLICY ATTEMPTS TO PROVIDE THE ONLY WAY IN WHICH WAIVER SHALL TAKE PLACE.—The difficulty of this subject is illustrated by the recent decision of the Federal Supreme Court in *Penman* v. *St. Paul Fire and Marine Ins. Co.* (1910), 30 Sup. Ct. 312. The facts are practically as follows:

Plaintiff insured a building used for dwellings with defendant company against fire. One of the conditions of the policy provided against the keeping on the premises of benzine, benzole, dynamite, etc., "or other explosives." There was also a covenant that no agent, officer, or other representative of the company could waive conditions except by a writing attached to the policy. At the time he issued the policy defendant's agent knew that blasting powder was to be kept on the premises, because miners were to occupy them during the term of the insurance, and as the keeping of powder in the mines was forbidden by statute of necessity they kept it in their houses. For that reason he charged an increased premium rate. Later a special agent approved the risk. It was held that these circumstances did not amount to waiver by the defendant. The court says, citing with approval *Northern Assurance Co.* v. *Grand View Bldg. Ass'n.*, 183 U. S. 308, 46 L. Ed. 213, "We think the policy furnishes the only way by which its terms can be waived. * * * No agent had power to change or modify that contract except in the manner provided. * * * Any other ruling would take from contracts the certain evidence of their written words and turn them over to the disputes of parol testimony." The principal case is not nearly so extreme as the *Northern Assur. Co.* case, supra, because the facts do not show that there was powder on the premises at the time of the issuing of the policy while in the latter case it was clear that there was additional insurance already issued. However there was what might be called practical certainty that the condition would be broken. So even if the miners were not already in possession it would seem that the insurance was to take effect on the premises as they were when occupied, and it might be argued that these circumstances would prevent a valid inception of the contract unless the insurer consented or the equivalent. It is believed that the following line of reasoning supported by the majority of decisions, of which a few will be cited, presents a fair answer to the general language of the principal case on this point, at least so far as it applies to conditions affecting the inception of the contract.

If an agent may make such a condition he may also dispense with it. *Aetna Life Ins. Co.* v. *Fallow*, 110 Tenn. 720. If "no agent, officer, and no other representative could waive a stipulation, who was left to waive it for the corporation?" *Home Ins. Co.* v. *Gibson*, 72 Miss. 58; *Long Island Ins. Co.* v. *Great Western Mfg. Co.*, 2 Kan. App. 377; *Farnum* v. *Phoenix Ins. Co.*, 83 Cal. 246. An agent authorized to issue policies may generally waive conditions. *Continental Ins. Co.* v. *Brooks*, 131 Ala. 614; *Westchester Fire Ins. Co.* v. *Earle*, 33 Mich. 143. In other words the conditions of the policy amount to notice of the agent's limited powers. But clearly there can be no notice of matters affecting the inception of the contract, before the delivery of the policy, and very often then merely constructive notice. *Wood* v. *American Fire Ins. Co.*, 149 N. Y. 382, 52 Am. St. Rep. 733; *Bartlett* v. *Fireman's Fund Ins. Co.*, 77 Iowa 155; *Crouse* v. *Hartford Fire Ins. Co.*, 79 Mich. 249; *Eagle Fire Co.* v. *Lewallen*, 56 Fla. 246; *Fair* v. *Met. Life Ins. Co.*, 5 Ga. App. 708; *German American Ins. Co.* v. *Hyman*, 42 Colo. 156; *Dulany* v. *Fidelity and Casualty Co.*, 106 Md. 17; *Wisotskey* v. *Niagara Ins.*

Co., 189 N. Y. 532; *Virginia Fire & Marine Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429. The true theory of cases like the principal case should be that of estoppel, and waiver and estoppel seem to be exceedingly closely connected in such situations. It really amounts to fraud to accept a contract with full knowledge of the facts and later try to defeat it by setting up those facts. *Wood* v. *Ins. Co.*, supra. Under this principle there is no breach of the parol evidence rule. *Insurance Co.* v. *Wilkinson*, 13 Wall. 222. For a good comment on the *Northern Assur. Co.* case see *Virginia Fire and Marine Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429. So far as we have been able to ascertain the doctrine of the principal case as applied to conditions affecting the inception of the contract is in force only in Oklahoma, Massachusetts, and New Jersey. Rhode Island and Connecticut reach a similar result by different reasoning. *Liverpool & London & Globe Ins. Co.* v. *Richardson Lumber Co.*, 11 Okl. 585; *Sullivan* v. *Mercantile Town Mut. Ins. Co.*, 20 Okl. 460; *Oakes* v. *Ins. Co.*, 135 Mass. 248; *Dimick* v. *Met. Life Ins. Co.*, 69 N. J. L. 384, 62 L. R. A. 774; *Franklin Fire Ins. Co.* v. *Martin*, 40 N. J. L. 568; *Wilson* v. *Ins. Co.*, 4 R. I. 141; *Ryan* v. *Ins. Co.*, 41 Conn. 168. For a good case *contra* see *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342.

If it is admitted, however, that the knowledge of the agent in the principal case related to a condition which would avoid the contract in the future only, the conclusion reached by the Court is probably sound, as the insured then had notice of agent's limited power and, as there was practically no evidence that the company did in fact permit parol waiver by its agents. *Insurance Co.* v. *Wolf*, 95 U. S. 326; *Insurance Co.* v. *Fletcher*, 117 U. S. 519; *Ripley* v. *Ins. Co.*, 30 N. Y. 136; *Phoenix Ins. Co.* v. *Moxson*, 42 Ill. App. 164; *Dulany* v. *Fidelity and Casualty Co.*, 106 Md. 17; *United Firemens' Ins .Co.* v. *Thomas*, 53 U. S. App. 517; *Northwestern Nat. Ins. Co.* v. *Mize*, (Tex. Civ. App.) 34 S. W 670 This is a logical view and is probably the basis of the decision in spite of the general language used.

For an admirable discussion of this subject along these lines with very complete citation of authorities see 4 COOLEY'S BRIEFS on the LAW OF INSURANCE, pp. 2459-2658; also VANCE, INSURANCE, pp. 355-385. As to election and not waiver being the true doctrine see 18 HARVARD L. REV. 364.

R. W. D.

THE RIGHT OF A TRUSTEE IN BANKRUPTCY TO SUE FOR INJURIES TO THE BANKRUPT'S PROPERTY.—It is provided by § 70 of the Act of 1898, that "The trustee of the estate of a bankrupt * * * shall be vested by operation of law with the title of the bankrupt to (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to his property." One of the principal difficulties under this provision is to determine what are injuries to property, within subdivision (6) supra. Although subdivision (5) is broad enough to include (6), it has not thrown much light upon the latter clause, since the test of assignability